PP

v.

MARWAN ISMAIL

COURT OF APPEAL, PUTRAJAYA
MOHD GHAZALI YUSOFF JCA
ZULKEFLI MAKINUDIN JCA
ABDULL HAMID EMBONG JCA
[CRIMINAL APPEAL NO: B-05-156-2006]
28 DECEMBER 2007

CRIMINAL PROCEDURE: *Revision - Remand - Further remand, lawfulness of - Accused brought before magistrate's court for charge under s. 39B(1) Dangerous Drugs Act 1952 - Magistrate remanded accused for further two months because chemist report not ready - Whether remand lawful - Whether magistrate empowered to remand for charge under s. 39B(1) - Whether Pendakwa Raya v. Ilamaran Kanniappan wrongly decided*

CRIMINAL PROCEDURE: *Jurisdiction of court - Magistrate's court - Transfer of case to High Court - Whether consent of Public Prosecutor required under s. 39B(3) Dangerous Drugs Act 1952 - Whether s. 41A governing provision - Whether s. 41A should not be read subject to s. 39B*

CRIMINAL PROCEDURE: *Prosecution - Commencement of prosecution - Charge for trafficking under s. 39B(1) Dangerous Drugs Act 1952 - Transfer of case from magistrate's court to High Court - Whether a further step in prosecution - Whether prosecution commences at High Court - Whether s. 41A governing provision - Whether PP v. Oladotun Lukmanu Umaru & Ors wrongly decided*

The accused, charged under s. 39B(1) of the Dangerous Drugs Act 1952 ('DDA'), was remanded for a further period of two months when his case was brought up before the magistrate for an initial mention. The reason given for the further remand was that the chemist report was not ready. As such, the magistrate withheld the transmission of the case to the High Court. Subsequently, this matter was called up for revision to the High Court. The learned judge concluded that the further remand was unlawful and amounted to the usurpation of a judicial function by the prosecution. The learned judge ordered that the accused be reproduced before the magistrate to reconsider whether the case

should be transmitted to the High Court under s. 41A DDA or alternatively for his discharge pursuant to s. 29 of the Criminal Procedure Code ('CPC'). The Public Prosecutor ('PP') appealed to this court.

Held (dismissing the appeal and also setting aside order of learned judge and in place an order that case be remitted to magistrate court for an order under s. 41A DDA)
Per Abdull Hamid Embong JCA delivering the judgment of the court:

(1) Section 41A DDA deals with the procedure to be undertaken in respect of cases triable exclusively by the High Court. A charge for trafficking under s. 39B(1), an offence that attracts the mandatory death penalty, is certainly a case triable exclusively by the High Court. This special provision governs the procedure to be followed in respect of a person charged under s. 39B(1). The magistrate has no option but to strictly adhere to the steps to be undertaken thereunder. (paras 12 & 13)

(2) Where an accused charged for an offence under s. 39B(1) DDA is produced before a magistrate, the magistrate must do the following: (i) have the charge read to him; (ii) explain to him the charge; (iii) not to record any plea by the accused, even if he chose to make one; (iv) transmit the case to the High Court; and (v) cause the accused to be brought before the High Court as soon as is practicable. (para 13)

(3) Section 39B(3) DDA deals with a step in the prosecution of an accused charged under s. 39B(1). The consent of the PP is a public policy requirement that Parliament has provided for the safeguard of the accused. In practice, this step is undertaken by producing a letter of consent from the PP (or a Deputy PP pursuant to s. 376 CPC since the consent of the PP under s. 39(B)(3) is in effect not a personal power) before the High Court upon the commencement of the trial. It must be emphasised that once the case has been transmitted to the High Court, the provisions regarding trials before the High Court as provided in Chapter XX CPC takes effect. (para 15)

(4) Section 41 DDA is a special provision under a special law that operates independently of any other provisions. It provides for a convenient procedure whereby one who is charged with a capital offence under the DDA triable only by a High Court may be produced before "the appropriate subordinate court" (it need not be a magistrate court) in order to obtain an order for transmission. Once produced, that court is under a mandatory obligation to order a transmission of the case. This was the clear directive of the Supreme Court in *PP v. Lee Chan Sang*. The prosecution of the case on the other hand begins in the High Court, when the charge is read and the accused is asked to plea to it. Thus, giving the consent to it or withholding of it being a prosecution power may be exercised even at that stage. The exercise of that power by the PP is unconnected with the special procedure for transmission under s. 41A DDA. Hence, the proposition that s. 41A should be read with s. 39B cannot be accepted. (paras 16, 17 & 18)

(5) The decision in *PP v. Oladotun Lukmanu Umaru & Ors* that the act of a magistrate in transmitting the case to the High Court under s. 41A DDA was a further step in the prosecution was wrongly decided. This court was of the view that the prosecution of the case (following *Perumal v. PP*) begins only at the High Court. Similarly, the decision in *Pendakwa Raya v. Ilamaran Kanniappan* that an accused person may be remanded in custody pending the outcome of the drug analysis was wrongly decided. The DDA does not empower a magistrate to remand an accused person tentatively charged for trafficking under s. 39B(1). (para 19)

Bahasa Malaysia *Translation Of Headnotes*

Tertuduh, yang dituduh di bawah s. 39B(1) Akta Dadah Berbahaya 1952 ('DDA'), telah dikenakan lanjutan reman untuk tempoh dua bulan apabila kesnya dibawa di hadapan Majistret untuk sebutan awal. Alasan yang diberikan bagi lanjutan reman adalah bahawa laporan kimia belum disiapkan. Berikutan itu, Majistret telah menangguhkan pengangkatan kes ke Mahkamah Tinggi. Kes bagaimanapun kemudian dipanggil oleh Mahkamah Tinggi untuk semakan. Yang arif hakim memutuskan bahawa lanjutan reman adalah tak sah dan adalah satu perampasan fungsi kehakiman oleh pihak pendakwaan. Yang arif hakim dengan itu memerintahkan supaya tertuduh dikemukakan semula di hadapan

A Majistret bagi membolehkan beliau menimbang semula sama ada kes harus diangkat ke Mahkamah Tinggi di bawah s. 41A DDA atau secara alternatifnya untuk melepaskan tertuduh di bawah s. 29 Kanun Acara Jenayah ('CPC'). Pendakwa Raya ('PP') merayu ke mahkamah ini.

B

Diputuskan (menolak rayuan dan mengenepikan perintah yang arif hakim dan sebagai ganti memerintahkan kes dikemukakan di hadapan Majistret untuk perintah di bawah s. 41A DDA)

C **Oleh Abdull Hamid Embong HMR menyampaikan penghakiman mahkamah:**

(1) Seksyen 41A DDA adalah berhubung prosedur yang perlu diikuti bagi kes-kes yang terkhusus dibicarakan oleh Mahkamah Tinggi. Pertuduhan pengedaran di bawah s. 39B(1), satu
D kesalahan yang membawa hukuman mati, jelas satu kes yang hanya boleh dibicarakan oleh Mahkamah Tinggi. Peruntukan khas ini mengawal selia prosedur yang perlu diikuti berkaitan seseorang yang dituduh di bawah s. 39B(1). Majistret tidak
E mempunyai pilihan kecuali mematuhi secara ketat langkah-langkah yang perlu diambil di bawahnya.

(2) Di mana seorang tertuduh yang dituduh di bawah s. 39B(1) DDA dibawa ke hadapan Majistret, Majistret perlu mengambil langkah-langkah berikut: (i) membaca pertuduhan kepadanya;
F (ii) menerangkan pertuduhan kepadanya; (iii) tidak merekodkan apa-apa pengakuan dari tertuduh walaupun dia berhasrat berbuat demikian; (iv) mengangkat naik kes ke Mahkamah Tinggi; dan (v) mempastikan bahawa tertuduh di bawa ke hadapan Mahkamah Tinggi dengan sesegera mungkin.

G

(3) Seksyen 39B(3) DDA adalah berhubung langkah yang perlu diambil dalam pendakwaan seorang tertuduh di bawah s. 39B(1). Izin dari PP adalah satu keperluan dasar yang digubal oleh Parlimen bagi kebaikan tertuduh. Secara
H praktiknya, langkah ini diambil dengan mengemukakan surat izin dari PP (atau seorang Timpalan PP di bawah s. 376 CPC kerana izin PP di bawah s. 39(B)(3) bukan kuasa peribadi) kepada Mahkamah Tinggi di permulaan perbicaraan. Harus diingat bahawa sebaik sahaja kes diangkat ke Mahkamah
I Tinggi, peruntukan-peruntukan mengenai perbicaraan di hadapan Mahkamah Tinggi seperti yang diperuntukkan Bab XX CPC mula terpakai.

(4) Seksyen 41 DDA adalah satu peruntukan khas di bawah satu undang-undang khas yang berkuatkuasa bebas dari mana-mana peruntukan lain. Ia mengetengahkan satu prosedur selesa di mana seorang yang dituduh dengan kesalahan hukuman mati di bawah DDA dan yang hanya boleh dibicarakan oleh Mahkamah Tinggi boleh dibawa di hadapan "mahkamah rendah yang sesuai" (tidak semestinya Mahkamah Majistret) bagi mendapatkan perintah pengangkatan. Sebaik dikemukakan, mahkamah memikul tanggungjawab mandatori untuk memerintahkan pengangkatan kes. Ini adalah arahan jelas Mahkamah Agong di dalam *PP v. Lee Chan Sang*. Pendakwaan kes sebaliknya bermula di Mahkamah Tinggi, bilamana pertuduhan akan dibaca dan tertuduh diminta supaya membuat pengakuan terhadapnya. Oleh itu, memberi izin atau menahan izin yang berkenaan, sebagai satu kuasa pendakwaan, boleh sahaja dilaksanakan di peringkat ini. Pelaksanaan kuasa ini oleh PP tidak mempunyai kaitan dengan prosedur khas untuk pengangkatan naik kes di bawah s. 41A DDA. Oleh itu, pengataan bahawa s. 41A harus dibaca dengan s. 39B tidak boleh diterima.

(5) Keputusan di dalam *PP v. Aladotun Lukmaru Umaru* bahawa tindakan Majistret dalam mengangkat kes ke Mahkamah Tinggi di bawah s. 41A DDA adalah satu langkah lanjut dalam pendakwaan adalah silap. Mahkamah ini berpendapat bahawa pendakwaan kes (mengikuti *Perumal v. PP*) hanya bermula di Mahkamah Tinggi. Begitu juga, keputusan di dalam *Pendakwa Raya v. Ilamaran Kanniappan* bahawa seorang tertuduh boleh ditahan reman sementara menunggu dadah dianalisa telah diputus secara salah. DDA tidak memberi kuasa kepada Majistret untuk mereman seorang tertuduh yang dituduh sementara dengan kesalahan pengedaran di bawah s. 39B(1).

Case(s) referred to:

Perumal v. PP [1970] 2 MLJ 265 ***(refd)***

PP v. Ilamaran Kanniapan [1992] 1 CLJ 492; [1992] 3 CLJ (Rep) 224 ***(Ovrd)***

PP v. Oladotun Lukmanu Umaru & Ors [1990] 2 CLJ 1026; [1990] 2 CLJ (Rep) 795 HC ***(refd)***

PP v. Lee Chan Sang [1989] 1 CLJ 144; [1989] 1 CLJ (Rep)139 SC ***(refd)***

Legislation referred to:

Criminal Procedure Code, ss. 29, 325

Dangerous Drugs Act 1952, ss. 39B(1), B(3), 41A

A *For the prosecution - Wong Ching Kiat, AG's Chambers*
Accused in person

[Appeal from High Court, Shah Alam; Criminal Revision No: 43-18-2006]

Reported by Usha Thiagarajah

B

JUDGMENT

Abdull Hamid Embong JCA:

C

[1] The sole question for our decision is simply what a magistrate needs to do in a case where an accused person who is tentatively charged for drugs trafficking under s. 39B(1) Dangerous Drugs Act is brought up before him for a mention.

D

[2] The High Court at Shah Alam had called up this matter for a revision. The learned judge set aside the order of the magistrate who had earlier remanded the accused for a further period of two months when his case was brought up before the magistrate for an initial mention. The reason given for the further remand was
E that the chemist report on the drugs which was the subject matter of a tentative charge for trafficking under s. 39B(1) of the Dangerous Drugs Act 1952 (DDA) against the accused was not ready. As such the magistrate withheld the transmission of the
F case to the High Court.

[3] Both the learned deputy public prosecutor and the accused person were represented and advanced submissions at the revision proceedings before the High Court. The learned judge concluded that to further remand the accused person for another two months
G was unlawful and amounted to the usurpation of a judicial function by the prosecution. The learned judge then revised the order made by the magistrate (for a further remand of the accused) pursuant to his power of revision under s. 325 of the Criminal Procedure Code (CPC). The High Court then ordered that the
H accused be reproduced before the magistrate to reconsider whether the case should be transmitted to the High Court under s. 41A DDA or alternatively for his discharge pursuant to s. 29 CPC.

I

[4] Against that order the learned public prosecutor appealed to this court. A

[5] Before us the learned deputy public prosecutor argued that the magistrate has no power to transmit the case to the High Court without the consent of the public prosecutor under s. 39B(3) of the DDA. That section reads: B

> (3) A prosecution under this section shall not be instituted except by or with the consent of the Public Prosecutor;
>
> Provided that a person may be arrested, or a warrant for his arrest may be issued and executed, and any such person may be remanded in custody notwithstanding that the consent of the Public Prosecutor to the institution of a prosecution for the offence has not been obtained, **but the case shall not be further prosecuted until the consent has been obtained**. (emphasis by the DPP). C D

Subsection (4) reads as follows:

> 4. When a person is brought before a Court under this section before the Public Prosecutor has consented to the prosecution the charge shall be explained to him but he shall not be called upon to plead, and the provisions of the law for the time being in force relating to criminal procedure shall be modified accordingly. E

[6] The DPP argued that reliance by the learned judge on s. 41A of the DDA was a clear misdirection relying, in the main, on the decision of the High Court in the case of *Pendakwa Raya v. Ilamaran Kanniapan* [1992] 1 CLJ 492; [1992] 3 CLJ (Rep) 224 and quoting in particular this passage of that judgment: F

> ... the accused is brought before the court when the charge may be read and explained to him. He will not be asked to plead to the charge (see s. 39B(4) and neither will he be formally tried for the offence with which he had been tentatively charged until the consent by the Public Prosecutor as required under s. 39B(3) has been obtained. In the meantime the offending drugs should, as expeditiously as the circumstances of the case permit, be delivered to the Chemist for analysis and final determination of its weight and contents. Pending the Chemist report and the consent from the Public Prosecutor, the accused may by virtue of the proviso to subs. (3) of s. 39B, be remanded in custody. G H I

[7] The case of *PP v. Oladotun Lukmanu Umaru & Ors* [1990] 2 CLJ 1026; [1990] 2 CLJ (Rep) 795 was also relied upon where the learned High Court judge there opined that the public prosecutor's consent is a necessary safeguard that needs to be undertaken before one is exposed to a prosecution for an offence of drug trafficking in the High Court.

[8] It was further submitted that it would be unfair to subject an accused person to a charge under this section if the weight of the drugs had not been determined upon an analysis by the Chemist. As such s. 41A of the DDA should be read subject to s. 39B(3) of the DDA.

[9] Our understanding of the learned DPP's submission is that in short, the prosecution of an accused person for an offence of drugs trafficking under s. 39B(1) DDA should be put on hold until a consent of the public prosecutor has been given. The accused person may then, pending that consent be remanded in custody, and that s. 41A DDA till then, cannot be applied.

[10] Section 41A of the DDA reads:

> 41A. Special Provision relating to transmission of a case to and trial by, the High Court.
>
> (1) Where any case in respect of an offence under this Act is triable exclusively by the High Court or is required by the Public Prosecutor to be tried by the High Court, the accused person shall be produced before the appropriate subordinate court which shall, after the charge has been explained to him, transmit the case of the High Court without holding a preliminary inquiry under Chapter XV11 of the Criminal Procedure Code, and cause the person to appear or brought before such Court as soon as practicable.
>
> (2) When the accused person appears or brought before the High Court in accordance with subsection (1), the High Court shall fix a date for his trial which shall be held in accordance with the procedure under Chapter XX of the Criminal Procedure Code.
>
> (3) The trial of a case transmitted to the High Court under subsection (1) shall be by a Judge of the High Court sitting alone, and the provisions of Chapters XXI and XXII of the Criminal Procedure Code shall not apply to such trial.

(4) The provision of subsections (1), (2) and (3) shall have effect notwithstanding any other written law to the contrary.

[11] In the case of *PP v. Lee Chan Sang* [1989] 1 CLJ 144; [1989] 1 CLJ (Rep) 139, the Supreme Court said this of that section:

> Section 41A of the Act therefore confers jurisdiction on the Magistrate's Court only in so far as to receive the production of the accused and to have the charge explained to him and then to transmit the case to the High Court forthwith without holding a preliminary inquiry.
>
> The Magistrate's Court has no jurisdiction even to record a plea of the charge. Indeed s. 41(3) of the Act directs that the trial of the case shall be by a judge of the High Court sitting alone.
>
> Section 39B(3) of the Act provides that a prosecution under that section shall not be instituted except by or with the consent of the Public Prosecutor. That subsection also direct that the case shall not be further prosecuted until the consent has been obtained. In respect of the respondent the Public Prosecutor's consent was issued on only on 16 July 1984.
>
> Section 39B(4) provides that when a person is brought before a court but before the Public Prosecutor has consented to the prosecution the charge shall be explained to him but he shall not be called upon to plead.

[12] Section 41A DDA deals with the procedure to be undertaken in respect of cases triable exclusively by the High Court. A charge for trafficking under s. 39B(1), an offence that attracts the mandatory death penalty, is certainly a case triable exclusively by the High Court.

[13] In our view therefore, this special provision governs the procedure to be followed in respect of a person charged under s. 39B(1) DDA. The magistrate has no option but to strictly adhere to the steps to be undertaken thereunder. If an accused person charged for an offence under s. 39B(1) DDA is produced before a magistrate, he must do the following:

(i) Have the charge read to him.

(ii) Explain to him the charge.

(iii) Not to record any plea by the accused, even if he chose to make one.

(iv) Transmit the case to the High Court.

(v) Cause the accused person to be brought before the High Court as soon as is practicable.

[14] It may be noted that the reference to the preliminary inquiry in the section is now superfluous since Chapter XVII of the CPC has now been repealed (see Act A 908 w.e.f. 17 February 1995).

[15] Section 39B(3) DDA, deals with a step in the prosecution of an accused person charged under s. 39B(1) DDA. The consent of the public prosecutor is a public policy requirement which Parliament has provided for the safeguard of the accused person. In practice this step is undertaken by producing a letter of consent from the public prosecutor (or a deputy public prosecutor pursuant to s. 376 of the CPC, since the consent of the public prosecutor under s. 39B(3) is in effect, not a personal power), before the High Court upon the commencement of the trial. It must be emphasised that once the case has been transmitted to the High Court, the provisions regarding trials before the High Court as provided in Chapter XX of the CPC takes effect.

[16] Section 41A DDA is a special provision under a special law which operates independently of any other provisions. It provides for a convenient procedure whereby one who is charged with a capital offence under the DDA which is triable only by a High Court may be produced before "the appropriate subordinate court" (note that it need not be a magistrate court) in order to obtain an order for transmission. Once produced, that court is under a mandatory obligation to order a transmission of the case. This is the clear directive of the Supreme Court in *Lee Chan Sang (supra)*.

[17] The prosecution of the case on the other hand begins in the High Court, when the charge is read and the accused is asked to plea to it. (see *Perumal v. PP* [1970] 2 MLJ 265.)

[18] Thus giving a consent or the withholding of it, being a prosecutorial power, may be exercised even at that stage. The exercise of this power by the public prosecutor is in our view

unconnected with the special procedure for transmission under s. 41A DDA. We cannot therefore accept the proposition that s. 41A has to be read subject to s. 39B.

[19] With respect, we cannot agree with and hold it as wrong, the view in *PP v. Oladotun Lukmanu Umaru & Ors* that the act of a magistrate of transmitting the case to the High Court under s. 41A is a further step in the prosecution. In our view, the prosecution of the case, following *Perumal*, begins only at the High Court. Similarly we would also hold that the ruling of the learned judge in *Ilamaran Kanniappan* that an accused person in that situation may be remanded in custody pending the outcome of the analysis of the drugs to be wrongly decided. The DDA does not empower a magistrate to remand an accused person tentatively charged for trafficking under s. 39B(1).

[20] For these reasons, this appeal is dismissed. However upon our deliberation of the learned judge's order, we are minded to also set that aside and in place make an order that this case be remitted to the magistrate court to make an order under s. 41A of the DDA.